Supreme Court of the United States

JANUARY TERM, 1944.

ROBERT NORTH,
Petitioner,

AGAINST

UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended. The judgment of conviction of the Circuit Court was entered on December 29, 1943.

Statement of the Case.

The statement of the case is contained in the petition.

Specification of Errors.

(1) The Statute of Limitations having barred the prosecution of the petitioner, the Circuit Court erred in sustaining the District Court's failure to dismiss the indictment.

(2) The Circuit Court erred in holding that there was a question of fact presented to the trial jury by Reeves' testimony.

(3) The Circuit Court erred when it overlooked the theory upon which the trial Court submitted the case to the jury.

(4) The petitioner's rights were prejudiced when the District Court admitted evidence of acts committed after February 20, 1936, and the Circuit Court erred in sustaining the admission of this evidence.

ARGUMENT.

I.

The Statute of Limitations, Section 582, U. S. C. A. Chapter 16, Title 18, barred prosecution of the petitioner and the indictment as to him should have been dismissed.

The indictment was obtained February 20, 1939. Any act, therefore, before February 20, 1936, is outside of the limits prescribed by the Statute for the prosecution of the offenses as charged in the indictment.

Hyde v. *U. S.*, 225 U. S. 347.

The petitioner entered the employ of Bunker & Bramson in June, 1935, a year and one-half after it is claimed the scheme was inaugurated. He remained with them until December, 1935, when he terminated his employment. In December, 1935, petitioner went to work for another employer, Richard Walsh & Co. With this new firm he worked until May, 1936. From May, 1936, he worked for John J. Kramer & Co.

In its direct case, the Government, by the testimony of its own witnesses, Spiegel (pp. 244-246), McKnight (pp. 659, 684) and Wolfson (p. 438), revealed that the petitioner had completely disassociated himself from Bramson & Bunker.

To comply with the rule laid down in *Hyde* v. *U. S., supra,* the petitioner offered in his defense the testimony of Mangle, a customer of Bunker & Co. This testimony revealed that the petitioner had not only disassociated himself but had done an affirmative Act (pp. 1515-1532) (Exhibits M, N, O) (pp. 1521, 1522, 1533). This affirmative Act was all embracing and referred to the only known customer of petitioner, as revealed by the record.

At the end of the entire case, the trial Court admitted that it was a little bit troubled about the Statute of Limitations with reference to petitioner (p. 1554).

A conspirator may withdraw from the common purpose. If he does so, and three years have run without his participation, although others of the original conspirators may have continued in the execution of the common design, he cannot be prosecuted.

United States v. *Raley,* 173 Fed. 159.

See also:

Buhler v. *United States,* 33 Fed. (2d) 382.

If he shows an abandonment he cannot be prosecuted. What evidence is required to show such abadonment?

In the *Buhler* case, *supra,* it was said:

> "One of the cases referred to was *Ware* v. *U. S.,* 154 Fed. 577. The Court did not attempt to lay down any specific rule defining what would be a sufficient act of withdrawal or what would be com-

petent or sufficient evidence to establish it. The formation of a criminal conspiracy or adherence to a criminal scheme may be shown by evidence either direct or circumstantial, in practice often taking a wide range, and we see no reason why the withdrawal should not be held susceptible to proof of the same character. It might, of course, be shown by a writing, or by an express oral agreement, *and we think by conduct wholly inconsistent with the theory of continuing adherence.* (Italics mine.)

"It is, of course, to be conceded that, if one knowing of a conspiracy, or of a scheme to defraud, gives aid or assistance in consummating its purpose, he thereby becomes a participant * * *; and with that principle in mind counsel for the government argue that by his assistance at Watsonville appellant became a 'partner in crime' with the other defendants, and that the statute of limitations would not begin to run until there was a dissolution of such partnership, and appellant 'communicated by act or word' to his associates his decision to withdraw (citing cases).

"Accepting that as a correct statement of the rule, we have difficulty in perceiving in what respect appellant failed to bring himself within it. As has been pointed out, there never was any agreement of general or continued participation in the scheme. Such 'partnership' as arose from the casual assistance he gave, as apparently all parties understood, was to be limited and temporary. So far as appears, no one expected any further participation, assistance, or any further interest on his part, and upon the record it would seem clear that when he left Watsonville the other defendants understood that such relations as had

> existed were at an end. In short, the 'dissolution' was in accordance with the understanding had from the beginning. Unless an express declaration in words is indispensable—and this the government does not assert—we hardly see what more could have been done to effect a 'dissolution of the partnership', or to more fully advise the other parties of appellant's withdrawal."

Petitioner was a stock salesman. He had severed his connections with Bunker Co. in December, 1935. This was more than 3 years prior to the finding of the indictment. By his subsequent acts he rendered the scheme less easy of consummation.

As a salesman he used the telephone in selling bank stocks. His only known customer was Mangle. When petitioner advised her to withdraw her account from Bunker (pp. 1515-1532) he did everything that was legally required of him. What more could he do? Mangle's testimony revealed the extent to which petitioner had gone in having her transfer her account from Bunker & Co.

Petitioner's conduct revealed;

a. An intent to cut himself off from Bramson & Bunker.

b. An actual and effective withdrawal.

Mangle having been, by petitioner's actions, placed beyond the reach of Bramson & Bunker, and this at a time more than 3 years prior to the finding of the indictment, then, as a matter of law, petitioner should have been acquitted.

The trial Court stated (p. 1554):

> "The Court: I am a little bit troubled about the question of the statute of limitations with reference to North. Do you contend that he can be prosecuted after a lapse of three years from the time of the commission of the act which is shown and which is presumed to have been shown on the part of those constituting the operation of the scheme? Is that question clear? Suppose the operators of the scheme are shown to have done something during the month of December, 1935, while he was in their employ and working with them, and then suppose it is shown in part by the Government's proof that by December 31, 1935, he was discharged and his employment terminated but there is a failure of proof of any connection on his part thereafter, is it your argument that an indictment which charges the perpetration of a scheme three years after the following February would be a competent charge and constitute a competent charge against him?"

The government's attorney in attempting to remove the trial Judge's doubt argued (p. 1555):

> "I submit that North's duty, in order to discharge himself from this conspiracy, was not merely to call up Miss Mangle and tell her to withdraw, that he had terminated his association with these conspirators. It was his duty to advise his fellow conspirators that he withdrew his authority for them to continue in the course of their conspiracy. He must call up all of the people with whom he did business and advise them of the nature of the conspiracy and tell them to get out, and what to do. He must confess his crime."

A state of confusion apparently exists as to what constitutes a proper affirmative act to warrant invoking the Statute of Limitations in favor of a defendant in a criminal case.

The *Statute* must mean something. It was intended to bar prosecutions of conspiracy cases after 3 years. What act tolls the statute? What must a defendant do to disassociate himself from his co-conspirators. It can't be said that it was ever intended for a party to be bound for life just because he had participated in a conspiracy. By some means he can relieve himself of future liability and responsibility. It was clearly intended, that after a lapse of 3 years from his last act, his responsibility should cease.

Judicial interpretation created the theory of affirmative act of disavowal. (*Hyde* v. *U. S., supra.*) How far must one go before he can invoke the benefit of the Statute?

In the present case the Government's attorney would want the defendant to confess (p. 1555).

There is no authority for such contention.

The petitioner's acts were inconsistent with continuing adherence. In this case, no disputed question existed as to petitioner's severance of participation in any alleged scheme or conspiracy. As a matter of law the indictment should have been dismissed.

The trial Court's acceptance of petitioner's request to charge No. 31 (p. 1589) showed, that as a matter of law, there was no disputed question for the jury to pass upon. The government had offered no proof to contradict petitioner's contention.

The trial Court's denial of the motion to dismiss was error as a matter of law.

II.

The Circuit Court overlooked the theory upon which the trial Court submitted the case to the jury.

As to North the jury was given the proposition of determining whether he had done an affirmative act of disavowal.

Having withdrawn his support by December 31, 1935, it was incumbent upon the Government to show that some overt act had been committed after February 20, 1936, with the acquiescence of North. None was shown. To the contrary, petitioner advised and aided Mangle in frustrating the future acts of Bramson and the others.

By his acts and termination of employment petitioner could not be a conscious offender and the others could no longer be his agents (*Hyde* v. *United States, supra*).

His statement to Reeves that he would have nothing to do with Bramson is indicative of this (pp. 828, 829).

Petitioner by his actions as revealed in the Mangle testimony (pp. 1515-1532, Exhibits M, N and O), showed that if subsequent acts were performed they were not his acts (*Hyde* v. *United States, supra*).

The question of continuation by petitioner after February 20, 1936, was never intended by the trial Court, in view of request to charge #31 (p. 1589), to be considered by the jury in passing upon petitioner's innocence or guilt.

The Appellate Court overlooked this situation.

It used Reeves' testimony to find a question of fact upon which the jury had to pass. The analogy cited in *Sperry Gyroscope Co.* v. *N. L. R. B.*, 129 F. (2d) 922, 927, was cited by the Circuit Court to sustain its view that it was a factual question for the jury. This, despite the theory upon which the trial Court had submitted

this case to the jury, namely, had a sufficient affirmative act been done by petitioner to warrant his invoking the aid of the Statute of Limitations.

Petitioner's rights were prejudiced by this action of the Circuit Court.

III.

There was no evidence in the case from which it could be inferred that petitioner had not withdrawn from the conspiracy by February 20, 1936.

The trial Judge's charge (p. 1589) precluded any finding that petitioner remained in the conspiracy after the Statute of Limitations had tolled.

The charge reads as follows:

> "Thirty-one: 'You are instructed that there has been no testimony offered by the government to contradict the evidence submitted in behalf of the defendant, Robert North, that he had terminated his employment by Bunker & Co. during December, 1935 and prior to February 20, 1936.'
>
> I so charge."

On this alone there was left no question for a jury to decide.

In affirming the conviction the Circuit Court relied on Reeves' statement of his conversation with petitioner on the street as evidence from which the jury could infer that he had not withdrawn from the conspiracy by February 20, 1936. Stress was laid upon petitioner's statement "I was winding up or getting through with Bramson".

Reeves' testimony on this point was, however, as follows (p. 829):

"A. (Continuing) He asked me—he says, 'How are you doing? How are you?' Something along those lines; greetings, I said, 'I thought you were at 170 Broadway.' He said, 'No, I am through or getting through with Mr. Bramson. I don't want to have anything more to do with him'."

Reeves apparently did not recall whether petitioner had said "He was through or getting through". By taking his statement in conjunction with the testimony of Spiegel, McKnight and Wolfson, government witnesses, and the testimony of Mangle, a customer of Bunker & Co. and Goldman, defense witnesses, it is apparent that petitioner "was through" prior to February 20, 1936.

Reeves, who was the alter ego of Bramson and who had visited every place of operation used by Bramson, admitted that he had not seen petitioner at any time in 1936, in any office operated by Bramson (p. 827).

Reeves' statement was purely in the alternative and nothing upon which a jury could infer any definite fact. It was subject to two inferences. In substance, Reeves stated that he did not know which of two things he had been told.

The testimony of Spiegel revealed that petitioner worked from December, 1936, continuously through May, 1936, for Richard Walsh & Co. (pp. 244-245). Thereafter from May, 1936 he worked for John J. Kramer & Co. (pp. 245, 246).

The trial Court by its charge (*supra*), realized that the testimony revealed that petitioner had definitely terminated all employment with Bramson and Bunker in December, 1935. Hence the granting of request to charge #31 (p. 1589).

Reeves' testimony, because he couldn't state whether petitioner had said he was through or getting through, was not considered by the Court (request to charge #31)

as indicative of petitioner's continued employment after December 31, 1935.

It was a conceded fact after the government's case, that the only reason petitioner was being kept in the trial was to determine whether he had done an affirmative act of disavowal.

On the motions to dismiss the indictment (pp. 1554, 1555), the trial Court as a proposition stated that the government's proof showed that petitioner by December 31, 1935, had been discharged and his employment terminated and that there had been failure of proof by the government to show any connection by petitioner thereafter.

The government's attorney in his argument conceded that petitioner's employment had been terminated by December 31, 1935. Again we find that Reeves' testimony was never contemplated as evidence of petitioner's continuation of employment after December 31, 1935 (p. 1555).

In view of the Court's charge (p. 1589) the District Attorney cannot rely on Reeves' testimony for an affirmance of the judgment (*Hyde* v. *United States*, 225 U. S. 347).

CONCLUSION.

It is respectfully submitted that for all of the foregoing reasons, the fundamental questions involved in this application are of sufficient importance to require the exercise of this Court's supervisory jurisdiction by a writ of certiorari.

Respectfully submitted,

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